STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 1, 2007
v	No. 263272 Eaton Circuit Court
LEO PAUL CARMONA, Defendant-Appellant.	LC No. 04-020389-FC

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and sentenced to a prison term of 25 to 50 years. He appeals as of right. We affirm.

I. FACTS

Defendant's conviction arises from the death of Jonathan Matson, the son of defendant's girlfriend, Jessica Matson. Matson left her son in defendant's care while she went out with another gentleman. According to statements made to his attorney, defendant could not sleep, so he removed the victim from his bed and held him. When the victim did not sit still, defendant threw the 27-month-old victim to a tile floor. An autopsy revealed that the victim had been thrown with the force equivalent to a fall from a third-story building and died from a severe head injury that fractured his skull.

Defendant, on the advice of his mother, retained an attorney, Mick Grewal, on March 9, 2004. Defendant confessed his role in the victim's death to the police on March 11, 2004. Before the interview with police, Grewal made sure defendant was aware that his confession would be used against him, and Grewal encouraged the confession as a means of negotiating a plea agreement. Defendant was officially charged with second-degree murder on March 24, 2004. Defendant admitted at trial that he voluntarily spoke with the police.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his original attorney, Grewal, was ineffective by urging defendant to cooperate with the police and confess to the crime before charges were filed. We disagree.

A. Standard of Review

"Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

B. Analysis

Both the Sixth Amendment, US Const Am VI, and Const 1963, art 1, § 20, guarantee a defendant the right to counsel. After the initiation of adversary judicial criminal proceedings, such as the arraignment, a defendant is entitled to the presence of counsel at "critical" proceedings, including interrogations. *People v Frazier*, 270 Mich App 172, 179; 715 NW2d 341, lv gtd 477 Mich 851 (2006), citing *Michigan v Jackson*, 475 US 625, 629-630; 106 S Ct 1404; 89 L Ed 2d 631 (1986) (stating that it is "clear" that a defendant has a right to counsel during post-arraignment custodial interrogation). The right to counsel under the Sixth Amendment also comprehends the right to the effective assistance of counsel. *LeBlanc*, *supra* at 578, quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In the instant case, it is undisputed that defendant's March 11, 2004 confession, and the March 18, 2004 interview and reenactment both occurred before any charges were filed against defendant on March 24, 2004. Thus, defendant's constitutional right to effective assistance of counsel could not have been violated because it had not yet attached.

However, even if defendant's right to counsel had attached at the time of his confession, his claim of ineffective assistance of counsel would still fail because defendant has not overcome the presumption that Grewal's decision to advise defendant to confess constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A decision whether to encourage a defendant to confess is a strategy decision, and strategic choices made by an attorney about plausible options for a defense are "virtually unchallengeable." *Strickland*, *supra* at 690-691. Here, the testimony adduced at the *Ginther*[1] hearing shows that Grewal advised defendant to confess with the goal of obtaining a favorable plea bargain. The fact that a particular strategy does not work does not establish ineffective assistance of counsel. *Matuszak*, *supra* at 61. Therefore, even if defendant's right to counsel had attached at the time of his confession, because he has not overcome the presumption that Grewal's decision to advise defendant to confess constituted sound trial strategy, his ineffective assistance of counsel claim must fail.

III. ADMISSIBILITY OF DEFENDANT'S CONFESSION

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

Defendant next argues that the trial court erred in admitting his confession. Defendant maintains that the confession was coerced and involuntary, and that he was not advised of his *Miranda*[2] rights before giving the confession. Again, we disagree.

A. Standard of Review

In reviewing whether there was a valid waiver of the right against self-incrimination, and whether a confession was properly admitted, an appellate court conducts a de novo review of the entire record. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). The meaning of the terms "voluntary" and "knowing and intelligent" are questions of law to be reviewed de novo. *Id*. at 629-630, 633. However, the trial court's findings of fact concerning whether a waiver was voluntary or knowing and intelligent are reviewed for clear error.[3] *Id*. at 629-630, 635.

A defendant must be advised of his *Miranda* rights when he is subjected to a custodial interrogation. *Id*. at 632-633; *People v Peerenboom*, 224 Mich App 195, 197-198; 568 NW2d 153 (1997). When a defendant challenges the admissibility of a confession obtained after a custodial interrogation, the prosecution must prove by a preponderance of the evidence that there was a valid waiver of the right against self-incrimination. *Daoud*, *supra* at 634. A valid waiver must be both voluntary, and knowing and intelligent. *Id*. at 633. This is a bifurcated inquiry to be determined objectively based on the totality of the circumstances. *Id*. at 633-634.

In this case, it is undisputed that defendant had not been arrested and no restraints had been placed on his freedom of movement at the time he gave the confessions in question. Therefore, the March 11, 2004, interview in defense counsel's office did not constitute a custodial interrogation and *Miranda* warnings were not required. *Peerenboom*, *supra* at 197-198. Thus, the only question before this Court is whether defendant's confession was voluntary. *Id*. at 198-199. If so, the confession was admissible without the need to determine whether there was a knowing and intelligent waiver of defendant's right against self-incrimination. See *id*. at 197-198.

"[T]he use of an involuntary statement in a criminal trial, either for impeachment purposes or in the prosecution's case in chief, violates due process." *People v Cipriano*, 431 Mich 315, 331; 429 NW2d 781 (1998). The test for voluntariness is the same in the due process context as it is in the waiver of *Miranda* rights context. *Daoud*, *supra* at 635. In particular, voluntariness "has always depended on the absence of *police* overreaching." *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986) (emphasis added). A waiver is voluntary if it is "'the product of a free and deliberate choice rather than [police] intimidation, coercion, or deception . . . .'" *Daoud*, *supra* at 635, quoting *Moran v Burbine*, 475 US 412, 421;

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] Whether a waiver was knowing and intelligent involves an inquiry into the defendant's basic level of comprehension of the right against self-incrimination. *Daoud*, *supra* at 634. "'Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment.'" *Id*. at 629, quoting *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996).

106 S Ct 1135; 89 L Ed 2d 410 (1986). The voluntariness determination is "not concerned with moral and psychological pressures to confess emanating from sources other than official coercion." *Oregon v Elstad*, 470 US 298, 305; 105 S Ct 1285; 84 L Ed 2d 222 (1985).

In the present case, the only coercion alleged by defendant came from defense counsel. Defendant does not allege any kind of police coercion. Accordingly, defendant's confession was voluntary as a matter of law. The trial court did not err in denying defendant's motion to suppress the confession.

IV. SENTENCING DEPARTURE

Next, defendant argues that the trial court erred in finding that there were substantial and compelling reasons to depart from the sentencing guidelines range of 144 to 240 months. We disagree.

A. Standard of Review

In reviewing a departure from a sentencing guidelines range, we review the trial court's factual determination on the existence of a particular factor for clear error, the court's determination that the factor is objective and verifiable de novo as a matter of law, and the determination that the factor constituted substantial and compelling reasons for departure and the amount of the departure for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and the familiarity of the offender. *Id*. at 270.

B. Analysis

Under the sentencing guidelines act, MCL 769.31 *et seq*., a trial court must impose a sentence within the guidelines range unless there is a "substantial and compelling" reason for the departure stated on the record. MCL 769.34(3); *Babcock*, *supra* at 255-256. A reason is substantial and compelling when it meets the following criteria: (1) it is objective and verifiable; (2) it keenly and irresistibly grabs the attention of the court; (3) it is of considerable worth in deciding the length of a sentence; and (4) it is something that exists only in exceptional cases. *Id*. at 258. If a trial court finds that there are substantial and compelling reasons to believe that sentencing a defendant within the guidelines range would not be proportionate to the seriousness of the defendant's conduct and criminal history, then the trial court should depart from the guidelines. *Id*. at 264. However, any departure must be proportionate to both the seriousness of the defendant's conduct and criminal record. *Id*.

A departure cannot be based on "an offense characteristic or offender characteristic [that has] already [been] taken into account in determining the appropriate sentencing range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

In this case, the trial court noted that this was a "particularly heartless, brutal, senseless loss" of a young child's life. The trial court believed that defendant had lost control and had been selfish in waking up the 27-month-old victim to keep him company while the child's mother was away. At some point, the victim became fidgety and restless, and defendant lost control and slammed the child to the ground with the force equivalent to falling from a third-story window.

In justifying its departure, the court stated that the guidelines did not adequately consider the vulnerability of the victim, i.e., that he was 27 months old, helpless, tired, and innocent. Additionally, the guidelines did not account for the fact that this crime was "cold blooded." The court also stated that the brutality of the crime provided a basis for departure, remarking, "When you pick a kid up and do this type of damage to his skull on a tile floor that in my mind is brutal."

Defendant argues that he is entitled to resentencing because the trial court's reasons for departure are not objective and verifiable. We disagree.

Whether defendant lost control and slammed the child to the ground is a factor that is objective and verifiable, and is supported by defendant's own confession as well as the medical testimony concerning the child's injuries. The age, helplessness, and vulnerability of the victim are also objective and verifiable factors. Whether the crime was cold-blooded, i.e., committed "without emotion or feeling,"[4] is also objective and verifiable through defendant's own confession. The brutality of slamming a helpless, innocent toddler to the ground with such great force is a factor that is objective and verifiable as well.

Defendant also claims that the trial court's sentence should be reversed because it violated MCL 769.34(3)(b) by relying on factors, such as the impact on the victim's family, the brutality of the crime, and the vulnerability of the victim, which had already been considered and scored within the guidelines range. We disagree.

The trial court specifically found that the vulnerability of the victim and the brutality of the crime, although considered by the guidelines, were not adequately reflected in the guidelines scoring in this particular case. We agree. Defendant received ten points for Offense Variable (OV) 10 for exploiting a victim's vulnerability due to physical disability, mental disability, youth, a domestic relationship, or abuse of an authority status. In this case, defendant exploited not one, but several of these vulnerabilities (i.e., youth, domestic relationship, authority status, as well as the fact that the victim was tired and helpless). Further, defendant received zero points for OV 7 (aggravated physical abuse), thus indicating that the guidelines scoring did not adequately account for the brutality of the crime.[5] The guidelines also do not consider whether the crime was cold-blooded or whether defendant lost control of himself.

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[4] *Random House Webster's College Dictionary* (2d ed), p 256.

[5] If OV 7 had been scored at 50 points for excessive brutality, defendant's sentencing guidelines range would have been 162 to 270 months or life. MCL 777.61. But, as the trial court noted, the

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Accordingly, we conclude that the trial court did not abuse its discretion in determining that a departure from the sentencing guidelines range was warranted for substantial and compelling reasons. Furthermore, the extent of the departure imposed was not an abuse of discretion. Contrary to what defendant argues, the trial court did not impose a departure that "was more than double the sentencing guidelines range." Rather, the trial court departed from the upper end of the guidelines range of 20 years by five years. Defendant's 25-year minimum sentence is proportionate to the offense and the offender, despite the fact that defendant had no prior criminal record.

V. JUDICIAL MISCONDUCT

Defendant next argues that the trial court engaged in improper conduct, the cumulative effect of which deprived him of a fair trial. We disagree.

A. Standard of Review

Defendant did not object to the trial court's conduct below, so this issue is not preserved. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). Therefore, we review this issue for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). "'[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.'" *Cain v Dept of Correction*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996) (citation omitted). "Moreover, partiality is not established by expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display." *People v McIntire*, 232 Mich App 71, 105; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999). But a trial court must avoid excessive interference in the examination of witnesses or the use of disparaging remarks directed at defense counsel that may demonstrate partisanship and deny a defendant a fair trial. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). "The test is whether the judge's questions or comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). In evaluating a claim

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brutality in this case was not the type "designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37. Rather, it was the force used to throw the child that was particularly brutal. Further, defendant's argument that this case does not involve brutality in the conventional meaning of the word is unconvincing. The child did not suffer massive head injuries because he was vulnerable. He suffered massive head injuries because defendant slammed him down on a hard tile floor with a force equivalent to falling from a third-story window. It was clearly a brutal act under any sense of the word.

of judicial misconduct, "[p]ortions of the record should not be taken out of context in order to show trial court bias against [the] defendant; rather the record should be reviewed as a whole." *Paquette*, *supra* at 340.

In this case, viewed in context, the trial court's comments and rulings do not show partiality and did not deprive defendant of a fair trial.

In particular, the trial court's alleged inattentiveness and misconduct at the hearing on defendant's motion to suppress could not have affected defendant's substantial rights because, as discussed previously, the motion was meritless as a matter of law.

While the record at trial shows that the trial court may have misheard some of the testimony, this does not demonstrate that the court was inattentive during trial. Also, the fact that the court occasionally took some breaks from the bench does not show hostility, impatience, or annoyance with defense counsel—which, in itself, would not be enough to demonstrate that the court deprived defendant of a fair trial. The court did not excessively interfere with defense counsel's questioning of witnesses, and it did not disparage defense counsel or demonstrate partiality or partisanship. The court's comments had no bearing on the credibility of witnesses and cannot reasonably be construed as showing bias that may have influenced the jury's verdict. Although defendant asserts that the trial court made unfair evidentiary rulings, defendant does not address the merits of those rulings. In sum, defendant has failed to show that the trial court's comments and rulings deprived him of a fair trial.

Lastly, we are not persuaded that defendant was denied a fair trial because the trial court instructed the jury to "watch the news media" before returning for deliberations the next day. The challenged instruction was immediately preceded by the court's instruction that the jurors "not to talk about the case" and was then followed by the court's instruction, "don't read any news, soon enough you can talk about it if you want to talk about it, to whoever you want." Viewed in context, it is unlikely that the trial court intended to affirmatively instruct the jury to watch the news media, particularly considering that neither counsel objected. Even if the quoted instruction is accurate, however, given the overwhelming evidence presented against defendant, we conclude that this isolated remark did not affect defendant's substantial rights.

In sum, defendant has not shown that the trial court's conduct deprived him of a fair trial.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Bill Schuette